NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 18-1082, 18-1117

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PLANNED BUILDING SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ,

Intervenor.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT PLANNED BUILDING SERVICES, INC.

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GLOSSARY

"80-90 Maiden Lane" means the office building located at 80-90 Maiden Lane in New York, New York.

"2007 Decision and Order" or "2007 D&O" means the order issued by the National Labor Relations Board on August 30, 2007 and reported at 350 NLRB 998.

"2008 Decision and Order" or "2008 D&O" means the order issued by the National Labor Relations Board on March 27, 2008 and reported at 352 NLRB 279.

"ALJ" or "Judge" means Administrative Law Judge.

"ALJD" means the Administrative Law Judge Decision issued by Stephen Davis in this matter on May 13, 2003.

"APA" means the Administrative Procedures Act, 5 U.S.C. §§ 551 *et seq.*

"AM Property" means AM Property Holding Corporation, which purchased 80-90 Maiden Lane from the Witkoff Group.

"Clean-Right" means Clean-Right, the in-house cleaning contractor at 80-90 Maiden Lane that was wholly owned by the Witkoff Group.

"Decision and Order," the "2017 Decision and Order" or "2017 D&O" means the Decision and Order issued by the National Labor Relations Board on December 15, 2017 and reported at 365 NLRB No. 162.

"Intervenor," "Local 32BJ" or the "Union" means Intervenor Service Employees International Union, Local 32BJ.

"NLRA" or the "Act" means the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*

"NLRB," the "Board" or "Respondent" means Respondent National Labor Relations Board.

"PBS," "Charged Party," or "Petitioner" means Petitioner Planned Building Services, Inc.

"Second Circuit" means the United States Court of Appeals for the Second Circuit.

"Servco" means Servco Industries, Inc., which replaced PBS as the cleaning contractor at 80-90 Maiden Lane.

"Sixth Circuit" means the United States Court of Appeals for the Sixth Circuit.

"UWA" means the United Workers of America, which entered into a collective bargaining agreement with PBS at 80-90 Maiden Lane.

"Witkoff Group" means the Witkoff Group, which owned 80-90 Maiden Lane prior to AM Property Holding Corporation.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Neither the Board nor the Union adequately explain why this Court should ignore the Board's various prolonged and multi-year delays in resolving this matter. Had the Board concluded this litigation expeditiously, as it is statutorily charged to do under the Administrative Procedures Act, PBS would not be responsible for 17 years' worth of daily compounded interest on a backpay award covering a 13-month period that ended in June 2001. Nor would PBS have to compensate impacted individuals for the adverse tax consequences relating to the Board's improperly inflated backpay award. The Board's imposition of the daily compounded interest rate and excess tax remedy—neither of which were applicable Board law in the first decade this case remained pending—creates an unlawfully punitive backpay award that frustrates the Act's remedial purposes.

2. The dispositive due process flaw, as evidenced by review of the issues actually litigated by the General Counsel, Union and PBS before the ALJ more than 15 years ago, is that the individual successorship finding upon which the Board bases its liability finding was never "fully and fairly" litigated, as required to comport with due process. Since the Board confirmed (and does not dispute on appeal) that its individual successorship theory of liability was not set forth in the General Counsel's complaint, due process is satisfied only if "the conduct implicated in the alleged violation has been fully and fairly litigated." *Pergament*

United Sales, Inc. v. NLRB, 920 F.2d 130, 134 (2d Cir. 1990). In the present case, the only issue that was "fully and fairly litigated" was whether AM Property (the party with which PBS contracted to perform cleaning services at 80-90 Maiden Lane) and PBS shared and co-determined essential terms and conditions of employment, not whether PBS was individually Clean-Right's successor and individually violated Section 8(a)(5) of the Act.

ARGUMENT

I. This Court Should Not Excuse the Board's Multiple, Lengthy Delays in Resolving This Matter, Which Have Resulted in Unlawfully Punitive Backpay Remedies Ordered by the Board.

PBS's position on the Board's various, multi-year delays is straightforward: the Board's backpay remedy ordered on December 15, 2017 for a matter the Board initiated on January 11, 2002 should be set aside because neither daily compounded interest (which did not become Board law until 2010) nor excess tax payments (which did not become Board law until 2016) could have been ordered had the Board concluded this matter within a "reasonable time" as required by the APA.

Further, the Board's delay in processing this case is problematic on multiple fronts. ***First***, as noted in PBS's initial brief, this matter stalled for multiple years at the Board on two different occasions, with more than ***four years*** elapsing between the ALJ's decision and the Board's initial decision, and with another ***six years***

passing between the Board's acceptance of remand from the Second Circuit until the issuance of Decision and Order on December 15, 2017. J.A. 82; J.A. 151; *see generally* J.A. 190-204. "Fool me once, shame on you. Fool me twice, shame on me." *Filloramo v. Johnston, Lemon & Co.*, 700 F. Supp. 572, 580 n.5 (D.D.C. 1988). The Board tellingly makes no attempt to explain the reasons for its multiple delays, instead reframing the delay issue as one that is not properly before the Court (Resp. Br. at 47-51), notwithstanding that PBS's motion for reconsideration focused extensively on the delay issue and all the attendant delay-related harm it has suffered. J.A. 208-210, 221-223.

Second, under relevant Circuit precedent, this Court is "empowered to set aside [an agency] order on the basis of delay," with the Court's "corrective action" analysis focusing on "consequences of the agency's delay." *Dayton Tire v. Sec'y of Labor*, 671 F.3d 1249, 1253 (D.C. Cir. 2012); *Emhart Indus., Hartford Div. v. N.L.R.B.*, 907 F.2d 372, 378 (2d Cir. 1990) ("[T]he board's inexcusable delay in deciding this case—or, more precisely, ***the effects of that delay on the efficacy and reasonableness of the board's remedy***—provide an independent ground for denying enforcement.") (emphasis added).

Here, the adverse consequences and effects of the Board's delay—which the Board acknowledges are its imposition of "adverse tax payments and compound daily interest" (Resp. Br. at 52)—warrant appropriate corrective action. The

Board's multiple delays have resulted in PBS being order to (i) pay daily compounded interest on a nearly 17-year-old backpay award (despite daily compounded interest not being Board law for the first decade this case was pending), and (ii) compensate affected individuals for the adverse tax consequences of receiving a lump-sum backpay award covering that 17-year period (despite the excess tax penalty not being Board law for the first 15 years this case was pending).[1]

Although the Board argues that the Sixth Circuit's decision in *TNS, Inc. v. NLRB*, 296 F.3d 384 (6th Cir. 2002) is "distinguishable" (Resp. Br. at 54), the circumstances in this matter are nearly identical to *TNS*, as the Board seeks to hold PBS liable for backpay, inclusive of daily compounded interest and tax payments,

[1] Moreover, the punitive measure of the remedy imposed by the Board is further demonstrated by the windfall gained by the employees at issue through the arbitration between the Union and the Witkoff Group / AM that followed the sale of the building, which awarded severance pay to the employees subject to the instant Board order. *See* J.A. 102, n.6. While employees are entitled to vindicate separate rights, they are not entitled to double recovery for damages of the same type or form. *Quinn v. DiGiulian*, 739 F.2d 637, 644-645 (D.C. Cir. 1984) (allowing separate claims against union based on LMRDA and breach of duty of fair representation, but disapproving of "double recovery for … lost wages"). The remedy in this case is, at least in terms of backpay, duplicative of the remedy imposed by the arbitration award. Furthermore, contrary to the assertion of the Board in its Brief, *see* Br. pp. 48-49, the arbitration award was cited by the ALJ in his decision and is thus, part of the record in this case. J.A. 102, n.6.

that significantly accumulated over nearly two decades. In *TNS*, just as in the present litigation:

- The parties engaged in litigation covering nearly two decades that resulted in multiple Board decisions and two appeals to two separate Court of Appeals, *see TNS, Inc.*, 296 F.3d at 388-389 (recounting litigation history between employer, union, and Board that commenced with a 1981 work stoppage, included ALJ decisions in 1983 and 1987, a Board decision in 1992, an appeal to the D.C. Circuit in 1995, a second Board decision in 1999 following remand, and concluded with the employer's appeal to the Sixth Circuit in 2000);
- The Board sanctioned mid-litigation modifications to the General Counsel's alleged theory of liability, *see id.* at 388 (discussing the Board's rejection of the employer's challenge to the General Counsel's amendment of the complaint in response to the employer's motion to dismiss);
- The employer's liability was unsettled throughout the litigation, culminating with the Board's finding of liability nearly two decades after the alleged unlawful activity occurred, *see id.* at 388-390, 404 (discussing the ALJ's initial finding of liability in 1987, the Board's reversal of the ALJ's liability finding in 1992, the D.C. Circuit's remand to the Board in 1995 to clarify its reasoning from the 1992 decision, the Board's "reaching a decision contrary to its earlier position" in 1999, and the employer's appeal to the Sixth Circuit, which

found that "[t]his court does not see a reasonable way to hold the Company responsible for damages accruing over all of this time")[2]; and

- The Sixth Circuit rejected nearly all of the arguments offered by the Board and the Union as to why this Court should disregard the Board's delay, *see id.* at 404 (rejecting Board's argument that "there was no inexcusable delay, in that the case presented novel issues, produced a voluminous record and resulted in a lengthy 161–page decision by the ALJ, two comprehensive Board decisions, and a court of appeals remand, as well as time spent by the Board trying to reach a settlement between the parties" and noting that although "[t]his is all true . . . the undisputed fact is that the case was filed with the Board in 1982. The Board's ALJ did not issue a decision until 1987. The Board did not issue its decision affirming the ALJ until 1992, more than five years later. After remand by the District of Columbia Circuit in 1995, the Board did not issue its second decision until September 1999, more than four years later.").[3]

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[2] Indeed, prior to the Board's 2017 Decision & Order, PBS had been adjudged "not liable" as a successor—a finding that stood for more than a decade since the Board's August 30, 2007 Decision and Order reversed the ALJ's findings on both the joint employer and joint successor issues, J.A. 82; 94-95.

[3] This same rationale, lack of excusable delay, should dispose of the Board's and Union's contention that the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2250 (2014) precluded the Board from acting in a more expeditious manner. Moreover, *Noel Canning* does not explain the Board's initial four-year delay between the ALJ's initial decision in 2003 and the Board's first order issued in this matter in 2007.

Finally, the exact same delay-related harm arising from significantly delayed Board orders occurred here. PBS has been "harmed by excessive delay" because the "company's liability for [the] violation ultimately found continuously escalate[d] while the case [wa]s pending." *Emhart Indus.*, 907 F.2d at 379. As applied to these facts, the delay-related financial harm is even more acute, given PBS held the cleaning contract at 80-90 Maiden Lane for less than 13 months, yet now must pay daily compounded interest accruing over a 17-year timeframe and excess tax penalties that were never contemplated during the pendency of this litigation[4].

In a variety of contexts, Circuit Courts have held that Board delays of between four and seventeen years are inexcusable. *See NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 232 (2d Cir. 1983) (four years from filing of charge); *Silverman v. NLRB*, 543 F.2d 428, 430 (2d Cir. 1976) (finding "no merit whatsoever in its present assertion that this delay of more than five years is excusable"); *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 189 (2d Cir. 1991)

[4] An example illustrates how compounding interest causes a backpay award to grow at an increasing, punitive rate. A $10,000 backpay award, calculated with six percent daily compounded interest over a 17-year period, results in a backpay award, inclusive of interest, of $27,729.42. A $10,000 backpay award, calculated with six percent simple interest over a 17-year period, results in a backpay award, inclusive of interest, of $20,200.00. In other words, daily compounding interest results in payments of $17,729.42, rather than $10,200.00, which amounts to payment of $7,529.42 more in interest alone and is approximately 177% higher than an order subject to simple interest.

(delay of "six years after the misconduct"); *TNS*, 296 F.3d at 404 (seventeen-year delay between filing of case to issuance of Board decision on appeal). The same rationale applies under the present circumstances.

II. Both the Board and the Union Improperly Conflate the Actually Litigated "Joint Employer" Issues With the Unlitigated "Individual Successorship" Issues.

The primary due process defect relating to the Board's 2017 Decision & Order matter stems from the fact that "it cannot be said that the unalleged issue of PBS's individual successorship was fully litigated." J.A. 199 (Miscimarra, dissenting). By conflating the actually litigated "joint employer" issue with unlitigated "individual successorship" issue, both the Board and the Union advocate for an improper "attempt[] to decide this [successorship] issue absent any allegation or argument that PBS was individually a legal successor to Clean-Right." J.A. 199 (Miscimarra, dissenting); (Resp. Br. at 23-30) (Int. Br. at 9-16).

This Court should reject the Board's and Union's contentions regarding the purported "full litigation" of PBS's individual successorship to Clean-Right because it "ignores an elemental reality: given that the General Counsel's theory of the case was that PBS and AM were joint employers and therefore joint successors with a joint obligation to recognize and bargain with the Union, PBS could have reasonably chosen a litigation strategy aimed at defeating the General Counsel's case on the threshold joint-employer issue." J.A. 203 (Miscimarra, dissenting).

This conclusion is buttressed by the ALJ's decision, which framed the purported "successorship" issues actually litigated as whether (i) "beginning on about April 25, 2000, ***AM and PBS*** took over building maintenance services at 80 Maiden Lane in a basically unchanged form and manner;" (ii) ***AM and PBS*** . . . informed the 80-90 Maiden Lane employees that they would not be hired to work at that building"; and (iii) "but for the conduct set forth [] above, ***AM and PBS*** would have employed, as a majority of its employees at 80-90 Maiden Lane, individuals who were previously employees of Witkoff and Clean-Right." J.A. 124 (emphasis added).

In other words, the relevant issues actually litigated were "joint employer" issues, namely whether ***AM and PBS*** "share[d] or codetermine[d] those matters governing the essential terms and conditions of employment." *See NLRB v. CNN Am., Inc.*, 865 F.3d 740, 749 (D.C. Cir. 2017); J.A. 121-124. Indeed, according to the ALJ, the actually litigated issues were whether ***AM and PBS*** jointly set the terms and conditions of employment (*i.e.*, "took over building maintenance services . . . in a basically unchanged form") and had the joint authority to hire and fire (*i.e.*, "informed . . . employees that they would not be hired to work"). J.A. 124. This is unsurprising, since "not once, but twice [] the General Counsel did not litigate this case on the theory that PBS individually was Clean-Right's successor." J.A. 202 (Miscimarra, dissenting).

The Board and Union essentially contend that the ALJ's cursory analysis of the purported "successorship" issues relevant to PBS excuses the Board's due process violations. It does not, as "[t]he various linguistic formulae and evidentiary mechanisms" utilized by the Board "are not talismanic," particularly when the relevant "inquiry is often an inferential and fact-based one." *NLRB v. Int'l Longshoremen's Ass'n, AFL-CIO*, 473 U.S. 61, 81 (1985). That is precisely the case here, since "whether a charge has been fully and fairly litigated is so peculiarly fact-bound as to make every case unique." *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 136 (2d Cir. 1990).

Moreover, even assuming that certain record evidence could be probative of PBS's purported individual successorship to Clean-Right, "the mere fact that a hearing record contains evidence relevant to a particular issue does not satisfy due process if the respondent was not on notice that the particular issue was *at issue*." J.A. 203 (Miscimarra, dissenting) (emphasis in original) (citations omitted); *Montgomery Ward & Co. v. NLRB*, 385 F.2d 760, 763 (8th Cir. 1967) ("It offends elemental concepts of procedural due process to grant enforcement to a finding neither charged in the complaint nor litigated at the hearing."). And, it is not PBS's obligation to outline on appeal what specific facts it would have adduced had the case been remanded to the ALJ. *See Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983) ("Nor do we believe it was [the employer's] burden to

show that, had it been accorded due notice . . . it could have adduced facts or altered its presentation to defeat the claim."). It is enough that PBS "could have reasonably chosen" a different litigation strategy, had it been on notice of the individual successor theory of liability. J.A. 203 (Miscimarra, dissenting).

Additionally, "the Board has recognized that when the General Counsel has chosen to litigate against a respondent on a narrow theory of liability, and the respondent was reasonably led to believe that it would not have to defend on a broader theory," it is not thereafter "free to resolve the case on a broader theory." *Indep. Elec. Contractors of Houston, Inc. v. NLRB*, 720 F.3d 543, 552–54 (5th Cir. 2013) (citing *Sierra Bullets, LLC*, 340 NLRB 242, 243 (2003) and distinguishing *Pergament*, 920 F.3d at 130). While the General Counsel could have proceeded on the more broad "individual successorship" theory—which would not have required that the General Counsel first establish a "joint employer" relationship between AM Property and PBS—the General Counsel did not do so, and any finding as to individual successorship is unwarranted.

Finally, when "the nature of the violations requires different proof," due process concerns are well founded, as they are here with PBS. *See Indep. Elec. Contractors of Houston, Inc.*, 720 F.3d at 553. Because different proof was required to establish the "joint employer" status of AM Property and PBS and the "individual successor" status of PBS and Clean-Right, it follows that PBS has been

denied due process as to the unalleged "individual successor" issue. *See id.* at 554 (declining to enforce Board order "on due process grounds" when "whether [the employer] could have offered additional justifications for its practices, or disproved the alleged systemic disadvantage imposed on union applicants . . . is unknown because respondent had no notice that this was necessary").

CONCLUSION

For the foregoing reasons, PBS respectfully requests that the Court (i) vacate the Board's Decision and Order, including the backpay remedy ordered, and deny the Board's cross-petition for enforcement, or (ii) in the alternative, remand to the ALJ to permit the parties to fully and fairly litigate the issue of whether PBS was an individual successor to Clean-Right.

Respectfully submitted,

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Dated: December 18, 2018

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), PBS certifies that its brief complies with the type-volume limitations in Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the document contains 2921 words.

The document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the document was prepared in Times New Roman 14-point font using Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I hereby certify that, on December 18, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system, and I certify that the foregoing document was served on all parties or their counsel of record through the Court's CM/ECF system.

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STATUTES AND REGULATIONS

5 U.S.C. § 555

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.